PEMBERTON GREENISH

improvements

service charges

managers appointed by the leasehold valuation tribunal

variation of leases

forfeiture

Commonhold And Leasehold Reform Act 2002

The Commonhold and Leasehold Reform Act received Royal Assent on 1st May 2002. The provisions of the Act will be phased in from July.

The Act's main headings can be summarised as follows:

Part I - Commonhold

Part 2

Chapter I - Right to manage
Chapter II - Collective enfranchisement
Chapter III - Flat claims
Chapter IV - House claims
Chapter V - Service charges etc.
Chapter VI - Leasehold valuation tribunals
Chapter VII - General

Pemberton Greenish are producing a number of briefing papers on the Act. In this briefing paper we look at the following issues under Chapter V in Part 2

1. improvements
2. service charges
3. managers appointed by the leasehold valuation tribunal
4. variation of leases
5. forfeiture

Improvements

One of the principles of Chapter 5 is to bring improvements within the scope of current provisions relating to the recovery of service charges and the management of residential premises. This has resulted in a number of amendments

- service charge is defined by Section 18(1) of the Landlord & Tenant Act 1985 as a variable amount payable by a tenant of a dwelling for services, repairs, maintenance, insurance and the landlord's costs of management. The definition is extended by the Act to include costs incurred in respect of improvements. Accordingly, where a landlord is entitled to recover the cost of improvements from the tenant under the terms of the lease such costs will be limited to the extent that they have been reasonably incurred, in respect of works or services carried out to a reasonable standard and which are reasonable in amount

- a manager may be appointed by the court under Section 24 of the Landlord & Tenant Act 1987 to carry out functions in connection with the management of the premises or the functions of a receiver. Management in this context encompasses the repair, maintenance and insurance of the premises and is now extended to cover improvements

- in certain circumstances tenants of residential premises are entitled to acquire the landlord's interest under Section 29 of the Landlord & Tenant Act 1987. Such orders are granted where the court is satisfied that the landlord is in breach of any obligation under the lease relating to the repair, maintenance, insurance or management of the premises. It will now be possible for tenants to seek the appointment of a manager where the landlord is in breach of any obligation in the lease to carry out improvements

- tenants are entitled to appoint an auditor to carry out a management audit to ascertain whether the landlord has discharged his management functions under the lease in an efficient and effective manner and whether the service charges collected from the tenants are being applied in an efficient and effective manner. The meaning of management functions for this purpose is extended to include improvements

- there is provision in the Leasehold Reform, Housing & Urban Development Act 1993 for the Secretary of State to approve codes of management practice. Such codes are designed to promote desirable practices relating directly or indirectly to the management of residential premises by landlords or any other person who discharges management functions. The Act amends section 87 of the 1993 Act so that "management functions" include the carrying out of improvements. A consequential amendment is made to the definition of service charge for this purpose which will include an amount payable in respect of carrying out improvements

- tenants have the right to appoint a manager to carry out management functions under the Housing Act 1996. Again, these functions will include the carrying out of improvements.

Service Charges

Consultation

Section 20 of the Landlord & Tenant Act 1985 requires the landlord to consult tenants before carrying out works the cost of which they are obliged to contribute towards via the service charge. The landlord's right to recover such costs where the consultation exercise has not been carried out (and has not been dispensed with by a determination of a leasehold valuation tribunal), is restricted at present to the aggregate sum of £50 per flat multiplied by the number of flats in the building or where the total cost of the works exceeds £1,000. Regulations will set out the new prescribed amounts but the consultation exercise under the Act will now apply where the landlord is proposing to carry out works to a building or any other premises and also where he proposes to incur costs under an agreement for the provision of works or services lasting for a period in excess of twelve months. Although regulations will also set out details of what the landlord is required to do by way of consultation, the Act specifically provides that they may include provisions requiring him

- to provide details of proposed works or agreements to tenants or a recognised tenant's association
- to obtain estimates for the proposed works or agreements
- to invite tenants or a recognised tenants' association to propose the names of those from whom the landlord should try to obtain other estimates
- to have regard to any observations made by tenants or a recognised tenants' association in relation to the proposed works, agreements or estimates and
- to give reasons for carrying out works or entering into agreements in certain circumstances.

A landlord may apply to the leasehold valuation tribunal for a determination that he may dispense with all or any of the consultation requirements. The tribunal may make the determination if it is reasonable to do so.

Statements of account

Tenants already have the right to require their landlord to provide a written summary of costs incurred in relation to service charges payable or demanded in the latest accounting year ending prior to the request where the accounts have been made up or in the 12 month period immediately preceding the request where the accounts have not been made up. Under the Act it will now be mandatory for the landlord to supply every tenant who pays a service charge with a written statement of account, whether or not one has been demanded, which includes the following information

- the service charges of the tenant and the other tenants in the building
- relevant costs relating to those service charges
- the aggregate amount standing to the credit of the tenant and the other tenants in the building at the beginning and end of the accounting period, and
- related matters

The statement must be sent to each tenant within 6 months of the end of the accounting period together with a certificate by a qualified accountant confirming that it deals fairly with the matters it is required to deal with and is sufficiently supported by accounts, receipts and other documents which have been produced to him. The statement must also give the tenant a summary of his rights and obligations in relation to service charges. The Secretary of State may make regulations dealing with the form and content of the statement, certificate and summary as well as prescribing exceptions to the requirement to supply an accountant's certificate.

A tenant can require the landlord to supply this information to him at any address in England and Wales by notifying the landlord or his agent accordingly.

If the landlord has not supplied a statement, accountant's certificate and summary within 6 months of the end of the accounting period or if the form or content of the document does not conform exactly or substantially with the requirements laid down by the regulations that are to be enacted by the Secretary of State, the Act provides that a tenant is entitled to withhold payment of the service charge.

The maximum amount which the tenant may withhold is a sum equal to the service charge which would otherwise be payable by him in the accounting period to which the documents relate plus a sum equivalent to his proportion of any credit at the beginning of the accounting period.

As soon as the landlord supplies the relevant documents, (where these have not been previously supplied), or provides a document which conforms with the regulations, the tenant must pay his service charge.

The landlord is entitled to apply to the leasehold valuation tribunal for a determination that he had a reasonable excuse for failing to supply the relevant documents within the time limit or for not supplying a document complying with the regulations. A tenant may not withhold his service charge payment after the determination is made.

Where a tenant withholds service charges because of the landlord's default, any provisions in his lease relating to non-payment or late payment cease to have effect for the period of the withholding.

Service charge demands

Every demand for the payment of a service charge must be accompanied by a summary of the tenant's rights and obligations in relation to the service charge. A tenant may withhold a service charge payment demanded from him if the summary has not been sent to him with the demand. Any provisions in the tenant's lease relating to non-payment or late payment of service charges are unenforceable during the period for which the payment is withheld. The Secretary of State may make regulations prescribing requirements as to the form and content of the summaries.

Inspection of documents

Provisions entitling tenants to inspect documents under Section 22 of the Landlord & Tenant Act 1985 have been amended by the Act. Accordingly, a tenant may serve a notice on the landlord requiring him to provide within 21 days reasonable facilities for inspecting accounts, receipts or other documents relevant to the matters which must be dealt with in the statement of account. The landlord must provide facilities for the

tenant to take copies or extracts, send copies or extracts to him or allow him reasonable facilities for collecting the copies.

The notice may be served on the landlord by the secretary of a recognised tenants' association.

A landlord can only be required to provide this information if the tenant's notice is given within 6 months from the date on which he is required to be supplied with the statement of account etc. (The statement of account itself must be provided within 6 months of the end of the accounting period). However, if the statement of account is not supplied within that period or it is supplied but does not conform to the requirements prescribed by the regulations, the 6 month period for the inspection of documents does not commence until the statement of account, or one conforming to the requirements, is supplied by the landlord.

The landlord must afford facilities for inspecting documents free of charge but may include the costs incurred as part of his costs of management. Otherwise the landlord may make a reasonable charge for doing anything else in compliance with the notice from the tenant.

Liability to pay service charges : Jurisdiction

The leasehold valuation tribunal has jurisdiction to determine the amount of the service charge which is payable. The Act extends its jurisdiction so that it is now able to determine

- the person by whom it is payable
- the person to whom it is payable
- the date at or by which it is payable and
- the manner in which it is payable.

An application can be made to the leasehold valuation tribunal for a determination as to whether a service charge would be payable for the costs of services, repairs, maintenance, improvements, insurance or management of any specified description and, if so,

- the person by whom it would be payable
- the person to whom it would be payable
- the amount which would be payable
- the date at or by which it would be payable and
- the manner in which it would be payable.

It will not be possible to make such applications in respect of a matter which

- has been agreed or admitted by the tenant

- has been or is to be referred to arbitration pursuant to an arbitration agreement entered into after the dispute arose

- has been the subject of a determination by a court or

- has been the subject of a determination by an arbitral tribunal.

The tenant is not deemed to have agreed or admitted any matter simply by making a payment.

Although it is possible for a tenant to enter into an arbitration agreement to resolve the dispute after it has arisen, any agreement providing for the resolution of a dispute other than by the leasehold valuation tribunal is unenforceable.

The jurisdiction conferred on the leasehold valuation tribunal is in addition to the jurisdiction of a court.

Service charge contributions to be held in designated account

Section 42 of the Landlord & Tenant Act 1987 provides that the person to whom service charges are paid must hold those sums on trust for the contributing tenants to defray costs incurred in connection with the matters for which service charges are payable. The Act sets out additional provisions which stipulate that the trust fund must be held in a designated account at a relevant financial institution.

The trust fund is in a designated account if

- the relevant financial institution has been told in writing that the sums standing to the credit of the trust fund are to be held in a designated account

- no other funds are held in the account and

- the account is one of a description specified in regulations to be made in due course by the Secretary of State

Regulations are to provide for what is meant by a relevant financial institution.

Any contributing tenant can require the person in receipt of the service charge contributions to afford him reasonable facilities for inspecting documents which confirm that the trust fund is in a designated account, provide him with copies of extracts of the documents or make reasonable facilities available for him to collect copies of extracts of the documents.

The request may be made on the tenant's behalf by a recognised tenant's association.

The tenant's notice can be given to the person to whom the service charge contributions are paid, his agent (if he is named as such in the rent book or other similar document), or the person who receives rent. If a notice is served on someone other than the person in receipt of the service charge contributions it must be forwarded to that person and he must comply with it within 21 days beginning on the date on which he receives the notice.

The person in receipt of the service charge contributions must make the relevant facilities available free of charge although he may recover any costs incurred as part of his costs of management.

The contributing tenant may withhold his payment of service charge if he has reasonable grounds for believing that the person entitled to receive the contributions has failed to put the trust fund in a designated account. He cannot be held in breach of the covenants in his lease for having failed to pay his service charge during the period it is withheld.

Failure to hold any trust fund in a designated account at a relevant financial institution without reasonable excuse is a criminal offence.

Where the offence is committed by a company with the consent or connivance of a director, manager, secretary (or other similar officer or a person purporting to act in such a capacity) or to be due to any neglect on the part of such an officer or person, that officer or person as well as the company is guilty of the offence.

Where the affairs of a company are managed by its members the member as well as the company will be guilty of an offence if an act or default of the company is committed with the consent, connivance or neglect of a member in connection with his management functions.

Managers appointed by leasehold valuation tribunal

Tenants have the right to apply to the court for the appointment of a manager under Section 21 of the Landlord & Tenant Act 1987. Before an application to the court can be made a preliminary notice has to be served by the tenant. The Act provides that the preliminary notice must be served not only on the landlord but also on any person (other than the landlord) who has obligations under the lease relating to the management of the premises or any part of them. This would include a maintenance trustee or management company. There are consequential amendments to take account of this change.

A tenant cannot apply for the appointment of a manager where the landlord is resident in the building. This restriction is partially relaxed by the Act so that an application for the appointment of a manager may now be made where at least half of the flats in the premises are held on long leases and they are not business premises to which the provisions of Part 2 of the Landlord and Tenant Act 1954 apply.

Variation of leases

A tenant under a long lease of a flat may apply to the court for an order varying the terms of that lease on certain specified grounds pursuant to Section 35 of the Landlord and Tenant Act 1987.

One of the grounds on which the application may be made is that the lease fails to make satisfactory provision for the insurance of the flat or any such building or land containing the flat or which is let to the tenant under the lease in respect of which rights are conferred on him under it.

The Act operates to restrict the grounds on which an application to vary a lease may be made so that it is no longer possible to apply on the basis that the lease fails to make satisfactory provision for the insurance of the flat itself. This is, in effect, consequent upon the rights granted to the tenant under the Act enabling him to take out insurance with an insurer who is not the landlord's insurer.

Under the Act jurisdiction for dealing with applications to vary a lease is transferred from the court to the leasehold valuation tribunal.

Forfeiture

A landlord under a lease of a dwelling originally granted for a term exceeding 21 years may not re-enter or forfeit that lease due to the failure by the tenant to pay rent, service charges, administration charges, or any combination of them, unless the unpaid amount exceeds the prescribed sum or includes an amount which has been payable for more than the prescribed period. Although the sum and the period have yet to be fixed, the Act provides that the sum shall not be more than £500.

If the unpaid amount includes a default charge, the default charge must be deducted from the unpaid amount for the purpose of ascertaining whether or not it exceeds the prescribed sum. For these purposes "default charge" means an administration charge payable in respect of the tenant's failure to pay any part of the unpaid amount.

These provisions do not apply to business premises, tenancies of agricultural holdings or farm business tenancies.

No forfeiture notice before determination of breach

A landlord under a long lease of a dwelling can no longer serve a notice under Section 146(1) of the Law of Property Act 1925 in respect of a breach of covenant by the tenant unless the landlord has first made an application to a leasehold valuation tribunal on the basis that

- a breach of covenant has occurred and it has been finally determined that the breach has occurred
- the tenant has admitted the breach
- a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement has finally determined that the breach has occurred.

A landlord can serve a Section 146 Notice on the expiration of 14 days from the date on which the final determination is made.

A landlord cannot make an application to the leasehold valuation tribunal in respect of the matter which:

- has been or is to be referred to arbitration pursuant to a post dispute arbitration agreement
- has been the subject of a determination by a court or
- has been the subject of a determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

Any agreement entered into by a tenant which provides for a determination as to a breach of covenant in any particular manner or on the basis of any particular evidence which might otherwise be the subject of an application to the leasehold valuation tribunal is unenforceable.

Forfeiture for failure to pay service charges etc

The Act provides that a notice given pursuant to Section 146(1) of the Law of Property Act 1925 must contain certain information where it is based on a tenant's failure to pay a service charge or an administration charge. The notice must inform the tenant that the landlord cannot forfeit the lease until there is a final determination by a leasehold valuation tribunal, court or arbitral tribunal that the amount of the charge is payable by him or, alternatively, that he has admitted the charge is payable.

Where the landlord obtains a final determination that the charge is payable he may forfeit the lease after the expiration of 14 days from the date on which the final determination was made.

The Act provides that regulations may be made setting out the requirements which must be met before a right of re-entry or forfeiture can be exercised in relation to a breach of covenant or condition in a long lease of a mortgaged dwelling.

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24 June 2002